89-655

No. 89-____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

CARL R. DAVIES,

Petitioner,

V.

SOUTHERN PACIFIC TRANSPORTATION COMPANY

and

BROTHERHOOD OF RAILWAY, AIRLINE, AND STEAM SHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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October 15, 1989

QUESTIONS PRESENTED

(1) Pursuant to Philip DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 76 L.Ed.2d 476, 103 S. Ct. 2281 wherein the six month statute of limitations of 29 USCS Section 160(B) was held to govern claims against both the employer and the union:

a) when does this statute begin to run, and;

b) what type of events would toll the statute.

(2) Petitioner bringing suit pursuant to 29 U.S.C.A. Section 185 against union and employer should not be limited to arbitration process based on other decisions of the Court that allow claims brought under other federal laws to proceed after arbitration proceedings.

PARTIES TO THE PROCEEDINGS

Mr. Carl Davies, Petitioner

Southern Pacific Transportation Company,

Respondent

and

Brotherhood of Railway, Airline, and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC)

Respondents

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Carl Davies prays that a writ of certiorari issue to review the judgement of the United States Court of appeals for the Eleventh Circuit in the above-styled case.

REPORT OF THE OPINION BELOW

The opinion of the Eleventh Circuit was not published, but is reproduced herein as Appendix C. The decision of the District Court is reproduced herein as Appendix B.

JURISDICTION

The decision of the court of appeals was entered on July 21, 1989, and no petition for rehearing was filed. Jurisdiction to consider this petition is governed by the provisions of Rules 20.2 and 20.4 of the Revised Rules of this Court and Section 2101(c) of Title 28, United States Code. (Petition for writ of certiorari, to be filed within ninety (90) days of the entry of the judgement.)

STATUTES INVOLVED

The Complaint filed by Petitioner was a hybrid suit against the union for breach of duty of fair representation and against the employer for unlawful discharge pursuant to the Labor Management Relations Act, 1947, Section 301, 29 U.S.C.A. Section 185. The statute of limitations involved is that construed to apply to these types of actions, being the National Labor Relations Act, Section 10(b), as amended, 29 U.S.C.A. Section 160(b).

STATEMENT OF THE CASE

On 1 March, 1983, Petitioner was hired by Respondent SOUTHERN PACIFIC as a chief clerk in the Atlanta office which consisted of seven employees with only two employees at this location paying union dues. Petitioner was treated as a non-union employee by SOUTHERN PACIFIC during his employment in that he did not receive

overtime pay, union pay raises or other salary benefits accorded union members.

Under the terms of the union shop agreement (R2-86-45) between the Respondents, the employer was required to notify the union, Respondent Brotherhood of Railway, Airline, and Steam Ship Clerks, Freight Handlers, Express and Station Employees (BRAC) of new employees within thirty (30) days. The union was then responsible for contacting the employee. (R2-8b-58). Respondent BRAC contends that it did not receive notification of Petitioner's employment from Southern Pacific until April 7, 1986, more than three (3) years and thirty (30) days after Petitioner's employment. (R2-8b-203). Respondent SOUTHERN PACIFIC contends that it notified BRAC of Petitioner's employment in January 1984. (R2-8b-7). In either case, the terms of

the applicable agreement were not adhered to by either Respondent. It is undisputed that Petitioner was not informed by BRAC as to his duty to maintain membership in the union until April 16, 1986. (R1-12-37 and R1-12-40). At that time, Respondent BRAC demanded back dues for the past three years. Petitioner tendered dues for the current month, including initiation fees, and stated that he would thereafter pay the monthly dues. (R1-12-43). BRAC refused the tender of Petitioner's dues for the current month and ordered Petitioner to pay all of the back dues demanded, or be terminated pursuant to the union shop agreement. (R1-12-44/45). On June 27, 1986, Respondent BRAC contacted Respondent SOUTHERN PACIFIC, representing that Petitioner had failed to comply with the terms of the union shop agreement in his failure to pay the back dues demanded

and SOUTHERN PACIFIC notified Petitioner that he could request a hearing.

On July 31, 1986, the requested hearing was held before Respondent SOUTHERN PACIFIC'S Acting Assistant Vice President of Sales. On August 20, 1986, Respondent SOUTHERN PACIFIC notified Petitioner that on the basis of the evidence produced at the hearing, SOUTHERN PACIFIC had decided that Petitioner had failed to comply with the terms of the union shop agreement. (R2-8b-3). This decision was appealed to Respondent SOUTHERN PACIFIC'S Manager of Labor Relations designated to handle appeals under the union shop agreement Section 5(b). The Manager of Labor Relations reviewed the evidence and upheld the decision of his colleague. (R2-8b-4).

Within the time provided in the union shop agreement, Petitioner requested that a neutral mediator be appointed to decide

the dispute and the National Mediation Board appointed Dr. Frances X. Quinn. (R2-8b-223). An arbitration hearing was conducted on December 9, 1986, with Dr. Quinn issuing a written opinion setting forth his findings of fact and opinion supporting his denial of Petitioner's grievance. (The opinion of Dr. Quinn is set forth herein as Appendix A) Contrary to the provisions of Addendum 3, Section 5(c) of the union shop agreement (R2-8b-148), Dr. Quinn's written opinion was issued more than thirty days late, (the date on the opinion is mistakenly listed as "1986" instead of "1987") and was not sent certified mail. (R2-8a-17). However, Dr. Quinn found that Petitioner had been treated identically to other employees as provided by the union shop agreement, and had enjoyed the benefits of representation, additionally finding that

Petitioner was in clear violation of the union shop agreement for failure to pay the back dues demanded by BRAC. Dr. Quinn also held that because the union and the employer had not complied with the agreement, the time for payment of back dues was extended to March 16, 1987. After that date, Petitioner would be subject to termination under the union shop agreement. (R2-8a-16 and Appendix A, Page 6 (a)).

In a further effort to attempt to resolve the situation, the Petitioner requested on January 22, 1987, that he be awarded his overtime pay since the time that he started to work, his moving expenses and the raises to which he would have been entitled to as a member of the union from which he would pay the back union dues. (R1-12-48). The union responded that the Petitioner had

forfeited his right to any benefits that were more than sixty days old since any other claims would be "untimely". (R1-12-49).

Petitioner filed a claim for the $335.00 in benefits with SOUTHERN PACIFIC for the only benefits which he had been told he could obtain by BRAC. Petitioner's request for these benefits was then immediately denied by SOUTHERN PACIFIC on February 17, 1987. (R1-12-50).

Petitioner then submitted his resignation, which was assumed by Petitioner to become effective on February 23, 1987. (R1-12-51)

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

On 19 August 1987, Petitioner CARL R. DAVIES filed a civil complaint in the United States District Court for the Northern District of Georgia against Respondent SOUTHERN PACIFIC TRANSPORTATION

COMPANY and BROTHERHOOD OF RAILWAY, AIRLINE, AND STEAM-SHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES alleging a breach of duty of fair representation by his former employer and the union. (R-1-1-1).

On 9 February, 1988, Southern Pacific filed a Motion for Summary Judgment and request for Rule 11 Sanctions. (R1-8-1). On 11 February, 1988, BRAC filed a Motion to Dismiss or, in the alternative, for Summary Judgment, in the Court below. (R1-9-1). Petitioner timely replied to both Motions for Summary Judgment. (R1-21-1, R1-13-1, and R1-12-19).

On 6 July, 1988, the District Court granted Respondents' Motions for Summary Judgment on all claims in the Complaint, on the grounds that the applicable six months statute of limitations had expired before Petitioner's Complaint was filed

and that Petitioner's action was subject to Summary Judgment on substantive grounds as Petitioner's exclusive remedy would be the administrative procedures already pursued. The District Court also declined to impose Rule 11 Sanctions on Petitioner. (See Judgment and Order of the District Court filed July 12, 1988, R1-19-1 and included herein as Appendix B).

Petitioner filed his notice of appeal to the United States Court of Appeals for the Eleventh Circuit on August 10, 1988. (R1-20-1). Respondent SOUTHERN PACIFIC filed its notice of cross-appeal on the denial of Rule 11 Sanctions against Petitioner on August 24, 1988. (R1-23-1). Oral argument was held before the Eleventh Circuit on May 24, 1989, and the decision of the Eleventh Circuit was entered on July 21, 1989. (Contained herein as Appendix C).

REASONS FOR GRANTING THE WRIT

Petitioner is aware that this Court's function is not to correct erroneous decisions of the lower courts; however, it is respectfully submitted that the Eleventh Circuit's decision in this case merits review because of:

1. The expansion by the Eleventh Circuit statute of limitation cases based upon a case that has been vacated and the decision of the district court squarly based on a vacated case;
2. The multiplicity of decisions in the different circuits regarding statute of limitations in 10(b) cases due to the lack of guidelines as to when the cause of action accrues;
3. The fact that Petitioner's case is one of first impression in that it deals with a fact situation wherein the employee is still employed by the

employer at the time the arbitrator's award is entered and the arbitrator's award extends the time for sanctions into the future;

4. The apparent disallowance of petitioner's Section 301 claims in district court because there was arbitration despite the fact that numerous decisions of this court have allowed claims under various federal laws to proceed in court regardless of previous grievance and/or arbitration proceedings.

THE IMPORTANCE OF THE ISSUES INVOLVED

A set of guidelines that would allow the lower courts to uniformly apply the various fact situations under which these claims arise would serve to assist the lower courts not only in Petitioner's case but in many other cases with persons similarly situated to Petitioner. The

lower courts have struggled for some fifteen years with this issue and guidance from this Court is sorely needed. Perhaps workable guidelines in this area could reduce the number of request for certiorari on this issue and would certainly assist plaintiffs in determining their rights. To allow the law to take the course that "final action" for filing suit as the date upon which the grievance procedure is terminated simply does not fully address the problem as a whole.

This Court has recently decided numerous decisions on other areas of law (Title VII, FELA, FLSA, 1983) which allow the aggrieved party to proceed under separate federal laws despite arbitration proceedings. Petitioner's claim under Section 301 is of no less importance than the above issues. Petitioner respectfully requests that his claim and the claims of

others so similarly situated be addressed by this Court.

STATUTE OF LIMITATIONS

Although DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 76 L.Ed.2d 476, 103 S. Ct. 2281 set forth the rule that the six month statute of limitation applicable to 10 (b) actions would apply to Section 301 hybrid suits and also recognized the possibility that a union member's claims may be tolled during the time he or she continues to seek relief through grievance procedures, the Court has not since expanded the decision to include guidance as to when the cause of action accrues or what would operate to toll the time when the action accrues. Since DelCostello, no case has come before this Court which answers those questions. In reviewing the various decisions in all of the eleven circuits which have applied and construed this 1983 decision, more questions have been raised than have been

solved and the various circuits are pursuing divergent avenues in resolving these issues.

The Eleventh Circuit seems to have taken the lead in this area deciding Emmett Proudfoot v. Seafarer's International Union, et al., 779 F.2d 1558, (11th Cir. 1986) and Edward C. Hester v. International Union of Operating Engineers, et al., 818 F.2d 1537 (11th Cir. June 1987), 830 F.2d 172, (11th Cir. October 1987) (Petition for Rehearing), 102 L.Ed.2d 963 (Case No. 87-1456, decided January 17, 1989, vacating judgment and remanding case to Eleventh Circuit) in an effort to expand upon the statue of limitations questions. Proudfoot v. Seafarer's International Union, et al., supra, answered the question of when the statute begins to run in the situation where the employee has already been

terminated and then files a grievance, at page 1559:

"In this case, because Proudfoot was discharged before the union initiated its grievance proceeding, the timeliness of his suit depends on the date on which the union took final action. By final action we mean the point where the grievance procedure was exhausted or otherwise broke down to the employee's disadvantage."

Then the Eleventh Circuit proceeded to decide the issue in Hester v. International Union of Operating Engineers, supra, based upon Proudfoot v. Seafarer's International Union, et al., supra, reiterating its previous holding to extend "final action" as the point in time at which the "grievance procedure was exhausted or otherwise broke down to the employee's disadvantage" rather than limiting Proudfoot, supra, to the fact that Proudfoot had already been discharged. However, Hester v. International Union of Operating Engineers, supra, was granted certiorari

at 102 L.Ed.2d 963 (Case No. 87-1456 1989) and judgment was vacated and the case was remanded to the Eleventh Circuit for further consideration in light of Reed vs. United Transportation Union et. al., 488 U.S. ____, 102 L.Ed. 2d 665, 109 S. Ct. (1989) which has now held that claims brought under Title I of the Labor-Management Reporting and Disclosure Act of 1959 (29 USCS Section 411 (a)(2) are subject to the state general or residual personal injury statues rather than the six month limitations period of Section 10(B) of the NLRA.

The ruling in the District Court was based upuon the application of a case that has now been overruled. This overruling leaves open the question presented in this case when the Petitioner is still working for the employer at the time that the arbitrator issues his award and the award

further extends the action to be taken for sixty days past the date of the award. No Eleventh Circuit decision has decided what occurs when the employee has not been terminated at the time the decision on the grievance or arbitration is issued. Nor has the Eleventh Circuit considered what might operate to toll the statute of limitations. Petitioner contends that due to the fact the the award was not to be effective for sixty days after the date of its issuance and that negotiations continued during the first thirty days after the award up until the time of Petitioner's resignation, that the cause of action should not accrue until such time as the Petitioner is discharaged or leaves his employment or on the date upon the arbitrator's decision is to take effect. Petitioner's suit was filed within six months of the date of his

termination of employment and within six months of the date set by the arbitrator for final action under the award but more that six months from the date of the issuance of the award, even though the exact date of that award is in question.

There has also been no consensus of opinion expressed by any of the other circuits in deciding these questions.

First Circuit - ArriagaZayas v. International Ladies' Garment Workers Union--Peurto Rico Council, 835 F.2d 11, (1st Cir. 1987) Decided two issues: (1) The filing of an unfair labor charge with the NLRB does not toll the statute of limitations for a Section 301 suit, and (2) Arbitration proceedings between the employer and the union likewise do not toll the statute of a Section 301 claim and the employee is not required to exhaust grievance procedures prior to

filing claim.

Second Circuit - Two cases have been decided on this issue in this Circuit. Eatz v. DME Union of Local Union Number 3 of International Brotherhood of Electric Workers, 794 F.2d 29, (2nd Cir. 1986) which holds that the cause of action accrues when the union members know or reasonably should know that a breach of duty has occurred and King v. New York Telephone Co., Inc., 779 F.2d 1558, (11th Cir. 1986) holds that the general rule in the Second Circuit is that a cause of action accrues when the Plaintiff could first have successfully maintained a suit based on that cause of action.

Third Circuit - West v. Conrail, 820 F.2d 90, (3rd Cir. 1987) also 780 F.2d 361 (3rd Cir. 1985) and 107 S. Ct. 1538, 95 L.Ed.2d 32 (1987). The District Court, after reversal by this Court, held that

the Plaintiff's claim was allowed when filed within six months of employee's discovery of union's inaction even though service was perfected past the six months. West, supra, is one of the few cases which has been heard by this court to expand on the DelCostello, supra, decision. Petitioner feels that his case raises issues and facts which are more far reaching and important which require the guidance of this Court than the limited issue raised in West, supra.

Sixth Circuit - Adkins v. International Union of Electrical, Radio & Machine Workers, 769 F.2d. 330 (6th Cir. 1985) held that the employees' good faith efforts to exhaust their contractual remedies will prevent accrual of action and Sevako v. Anchor Motor Freight, Inc., 792 F.2d 570, (6th Cir. 1986) which held that a claim based on an asserted

continuing violation is not barred merely because some violations may have also occurred before the time bar and that the fraudulent concealment of documents by the union may be sufficient to toll the statute.

Seventh Circuit -- The case of Clift v. International Union, Unite Auto., Aerospace & Agricultural Implement Workers of America (UAW), 818 F.2d 623, (7th Cir. 1987) was a case regarding the entry of the union and the employer into the Collective Bargaining Agreement and held that the cause of action accrues as of the time when the agreement is signed by the union and employer and not when the contested provisions are enforced. Fransden v. Brotherhood of Railway, Airline, and Steam Ship Clerks, 782 F.2d 674, (7th Cir. 1986) tolled the claim while the employee pursued his intra-union

grievance procedures.

Eight Circuit - Also has had only two cases with Alcorn v. Burlington Northern Railroad Co., 878 F.2d. 1105 (8th Cir. 1989) holding that a claim being filed six years after the Plaintiff obtained knowledge of the actions complained was not timely but the court did at least make inquiry as to when the Plaintiff's discovered their claim. The court in Petitioners case completely disregarded the facts raised as to the time the claim should accrue and summarily held that the date from which to start the six months is the date of the arbitrator's award. Stafford v. Ford Motor Co., 835 F.2d 1227, (8th Cir. 1987) commenced the statute of limitations on the date of a letter from the union which denied an appeal and stated no further action would be taken on behalf of the employee by the union.

Ninth Circuit - This Circuit has taken its leading case Galdino v. Stoody Co., 793 F.2d 1502, (9th Cir. 1986) reviewed all the Eleventh Circuit cases and stated that it appears that the general rule is that the statute commences when the employee knew or should have known of the final action. The Ninth Circuit notes that "This general rule, however, is not consistently applied." The Ninth Circuit also states that any reasoned analysis of the question when a duty of fair representation claim accrues must naturally focus on the context in which the claim arose. The simplest case is where the union will not file a grievance and the action accrues as of the date of such denial. (This holding also applied in the Lacina v. GK Trucking, 802 F.2d 1190, (9th Cir. 1986)). The court summed up by saying that a fair representation

claim based on how a grievance is presented to an arbitrator accrues when the employee learns of the decision. A case based on grounds other than how the union presents the grievance is presented to an arbitrator is tolled during the grievance procedures. However, this case is distinguished from Petitioner's case herein in that the union did not represent him at the arbitration and the arbitrator's award extended any final action for sixty days after the date of the arbitration award. The other leading case in this Circuit is the Zuniga v. United Can Co., 812 F.2d 443, (9th Cir. 1987) case which applied Galdino v. Stoody Co., supra, to the facts which were that a union member's claim accrued on the date that the union sent a letter stating that the union would not pursue any grievance any further. However, several letters

negotiating the employee's claim preceded the final letter. This case is closer to the Petitioner's claim on the facts in that after the arbitrator's award negotiations continued regarding payment of past benefits from which the disputed union dues would be paid. Petitioner did not resign until he received notification that all past benefits would be denied and he would still be required to pay the dues for the previous three years. It is Petitioner's position that the statute should not commence until the effective date of his resignation.

Fourth, Fifth and Tenth Circuits - No decisions on this questions have been considered in these circuits.

Due to the disparate holding in the various Circuits, and due to the vacating of Hester v. International Union of Operating Engineers, et al., supra, in

this last term, this Petitioner is in desperate need of consideration of these questions by this Court. These questions have remained unanswered since 1973 and have caused confusion among the various Circuits. The trend in the Eleventh Circuit towards holding that "final action" in any type of fact situation is going to mean that time when the grievance is decided despite the various fact situations in which these matters can arise simply does not address the true issues. The standard to be used was originally set out to be the later of the final action of either the employer or the union. Holding that "final action" is synonymous with the date upon which the grievance procedure is exhausted does not put forth a workable solution. What would be the result then, if the employer in this case had not accepted Petitioner's

resignation and continued negotiations for some months in the future? Petitioner would then have been forced to file his suit before he suffered any damages and against an employer who might have joined his side in this fight. The Petitioner requests that this Court set forth specific guidelines which should be used in determining upon which date the cause of action accrues so that the decisions which now vary considerably depending upon the various fact situations can be applied uniformly throughout the land.

ARBITRATION SHOULD NOT PRECLUDE HYBRID CLAIM UNDER SECTION 301

The district court in this case held that the Petitioner herein could not maintain his action in the district court as the "exclusive remedy for the type of claims plaintiff makes is the administrative procedure plaintiff has already pursued." (See district court

decision herein at Appendix 39a). The court then went on to quote from Andrews vs. Louisville & Nashville R. Co., 406 U.S. 320 32 L. Ed. 2d. 95, 92 S. Ct. 1562 (1972), at page 325 that: "A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding." However, the court left out the prior sentence which states: "It is clear, however, that in at least some situations the Act makes the federal administrative remedy exclusive, rather than merely requiring exhaustion of remedies in one forum before resorting to another". This case is not a case like Andrews, supra, wherein the party filed a wrongful discharge case in a state court without exhausting his administrative remedies.

Petitioner exhausted his administrative

remedies even though the administrative remedies which are specified under the collective bargaining agreement do not address the situation in which the Petitioner found himself. Petitioner was raising the issue that both the union and the employer had failed in their duties to him in treating him as a non-union employee for more than three years before he was advised of his duty to join the union. Petitioner did not refuse to joint the union, he only refused to participate in a windfall profit to the union for three years back due when he had received none of the benefits accorded union members. Petitioner stated that despite the fact that the union and the employer had each failed to comply with the terms of the collective bargaining agreement, both sides wanted him to strictly comply. This type of selective compliance is

inherently and patently unfair. The arbitrator was confined in his decision to the four corners of the collective bargaining agreement. Petitioner was forced to exhaust those administrative remedies, as then any further avenues of relief would have been closed to him. See Allis Chalmers Corp. v. Lueck, 471 U.S. 202, 95 L. Ed. 2d. 206, 105 S. Ct. 1904 (1985). The issue in this case is not one where the Petitioner has requested any relief under the collective bargaining agreement, nor has he requested to be returned to the position that he held in the railroad. As stated by Mr. Justice Douglas in his Andrews, supra, dissent at page 327: "He is finished with this railroad, and turns to other activities; he seeks no readmission to the collective group that works for the railroad. He leaves it completely and seeks damages for

having been forced out." It is inconceivable that Congress intended that a worker who had suffered from the fact that neither the union or the employer would take the requisite action under their collective bargaining agreement and would then make him the scapegoat for their sins would be denied recovery under Section 301 simply because he might also be able to process a narrow labor grievance under the RLA to a successful conclusion. To so apply the law would be to completely emasculate hybrid suits brought under the Labor Management Relations Act, 1947, Section 301, 29 U.S.C.A. Section 185. The congress passed a law which would allow for the filing of a suit against the union, knowing that there might be a collective bargaining agreement and administrative remedies to be exhausted. The law does not state that

these disputes are "minor" and the grievance procedure is the sole and exclusive remedy. The congress specifically created an additional remedy that could be used to right the wrongs committed against an employee by the union and the employer. At no time has this Court held that federal law is pre-empted in a case such as Petitioner's, or that the grievance procedure is the exclusive remedy.

This is not a case where Petitioner is complaining about "rates of pay, rules and working conditions." as found in the cases of Union Pacific R. Co v. Price, 360 U.S. 601, 3 L. Ed. 2d., 1460, 79 S. Ct. 1351. (1959). This case also does not fall within that scope of cases that are deemed to be "minor disputes" which have only the grievance procedure as their exclusive remedy. See Trainmen v. Chicago, R. &

I.R. Co., 353 U.S. 30, 401 L. Ed. 2d. 622, 77 S. Ct. 635, (1957). Respondent's have argued in previous briefs that Petitioner's complaint is barred by the six month statute of the NLRA. Additionally, respondents have argued that petitioner's claims are barred due to arbitration as stated under the RLA Section 3, First (q). There is some inconsistency in this position for if RLA Section 3, First (q) applies, then it should follow that RLA Section 3, First (r) which provides for a two year statute of limitations should also apply. This court has held that Section 301 claims are subject to a six-month statute and borrowed from 10 (b) instead of from RLA. It would not be right to borrow from the RLA for the proposition that Petitioner's claims are barred by the arbitration. This would mean hybrid claims are subject

to the shorter statute and the narrowest review known to law. Surely congress did not have this intent. All other cases which have disallowed claims in court based on arbitration have been inapposite to the Petitioner's claim hereunder.

Since the Andrews, supra, decision this Court has heard various cases brought under different laws and fact situations which have held that the petitioner's claims were not precluded in court due to the fact that they had pursued grievance or arbitration. In 1974 this Court considered the case of Alexander v. Gardner-Denver Company, 415 U.S. 36, 39 L. Ed. 2d. 147, 94 S. Ct. 1011 (1974) wherein the plaintiff had instituted a suit under Title VII in the United States District Court of Colorado and this Court found that his claim was not foreclosed by prior submission of his claim to final

arbitration under a nondiscrimination clause of a collective bargaining agreement. The grievance procedures described in this case are almost identical to those applicable in Petitioner's case. As in this case, the arbitration process prescribed under the collective bargaining agreement subordinated the interests of Petitioner for the interest of all employees in the bargaining unit. The arbitrator found that Petitioner was treated in a similar fashion to other employees. Doesn't the policy put forth by the arbitrator perpetrate a situation that allows the union to mistreat all members as long as they are all mistreated equally? If this decision is allowed to stand, unions will have no incentive to notify persons of their obligation to join the union at the outset and can instead sit back and wait

until substantial dues accrue. Then they can collect their back dues with no corresponding obligation of representation. Where is the justice in such a decision?

As in Alexander, supra, the federal policy of favoring arbitration would not be undermined by allowing Petitioner to pursue all of his claims in his hybrid suit in a court of law which could consider those issues outside the scope considered by the arbitrator.

A 1981 case considered whether claims brought under the Fair Labor Standards Act (29 U.S.C.A. Sections 201, et. seq) would be barred by prior submission to arbitration of wage claims based on the same underlying facts and held that they were not. Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 67 L. Ed. 2d. 641, 101 S. Ct. 1437 (1981). A

discussion was included in this case regarding the fact that the arbitrator is bound only to decide those issues allowed under the collective bargaining agreement and often is powerless to grant the aggrieved employee a broad a range of relief as they seek. The arbitrator is "confined to interpretation and application of the collective bargaining agreement" and his "award is legitimate only so long as it draws it essence from the collective bargaining agreement." (Quoting from Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597, 4 L. Ed. 2d. 1424, 80 S. Ct. (1358). However, since the employee had a separate claim under another federal law (FLSA) his claim was not precluded by the arbitration. This case also is extremely similar to Petitioner's in that he has a federal law available to him that is not dependant

upon the arbitration proceeding.

As stated on page 209 of Allis Chalmers, supra, when the Court is discussing Textile Workers vs. Lincoln Mills, 353 U.S. 448, 1 L. Ed. 2d. 972, 77 S. Ct. 912 (1957), it was noted that Section 301 expresses a federal policy that the substantive law to apply in Section 301 cases is "federal law, which the court must fashion from the policy of our national laws." A body of federal common law should be used to address disputes arising out of labor contracts. They should not be limited only to the arbitral process. McDonald v. West Branch, 466 U.S. 284, 80 L. Ed. 2d. 302, 104 S. Ct. 1799 (1984).

Unions do not need the protection today that was necessary when the body of labor law was created some forty years ago. Employers are much more responsive to the

needs of their employees today, partly due to the fights led by unions. However, in a situation where an employee is forced to be a union member by virtue of the fact that he is a railroad employee, he should have the opportunity to have his wrongs addressed by someone other than an arbitrator forced to fashion a remedy based upon a collective bargaining argreement which the employee was never advised applied in his situation. Petitioner should be allowed to pursue his claims in court.

CONCLUSION

The Petitioner respectfully requests that this Court use this case as the perfect opportunity to expand upon Philip DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 76 L.Ed.2d 476, 103 S. Ct. 2281, and set forth guidelines with respect to when a cause of

action accrues under U.S.C.A. Section 185 hybrid suit and what facts might operate to toll the accrual date. Petitioner feels that his cause of action was timely filed.

Petitioner also respectfully requests that this Court review Section 301 hybrid claims to determine if they are always barred by arbitration.

For the foregoing reasons, this Court should issue a writ of certiorari to the Eleventh Circuit and set this case for pleneary briefing and argument.

Respectfully submitted,

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APPENDICES

APPENDIX A

In the Matter of the Arbitration between:

Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, Employee Organization

and

Southern Pacific Transportation Company, Employer

and

C. R. Davies, Grievant, Employee

An arbitration hearing was held December 9, 1986, in Houston, Texas in accordance with the Agreement between the parties.

Appearances

BRAC	John Edmond, Esq. Philip Trittel, Chairman
Southern Pacific	Charles Lamb Sr. Mgr. Labor Relations
Grievant	Jan McKinney, Esq. Carl R. Davies, Grievant

Post-hearing brief on Grievant's behalf was received on December 26, 1986.

Questions at Issue

Whether pursuant to the provisions of the Union Shop Agreement Grievant's employment relationship should be terminated.

Background

This proceeding involves the application of certain provisions of the Union Shop Agreement between the Southern Pacific Transportation Co. and the Brotherhood of

Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees to Carl R. Davies.

Relevant Provisions of the Union Shop Agreement

"Section 1.

In accordance with and subject to the terms and conditions hereinafter set forth, all employees of the carrier now or hereafter subject to the rules and working conditions agreements between the parties hereto, except as hereinafter provided, shall, as a condition of their continued employment subject to such agreements, become members of the organization party to this agreement representing their craft or class within sixty calendar days of the date they first perform compensated service as such employees after the effective date of this agreement, and thereafter shall maintain membership in such organization; except that such membership shall not be required of any individual until he has performed compensated service on thirty days within a period of twelve consecutive calendar months. Nothing in this agreement shall alter, enlarge or otherwise change the coverage of the present or future rules and working conditions agreements.

"Section 4.

Nothing in this agreement shall require an employee to become or to remain a member of the organization if such membership is not available to such employee upon the same terms and conditions as are generally applicable to any other member, or if the membership of such employee is denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or remaining membership. For purposes of this agreement, dues, fees, and assessments, shall be deemed to be 'uniformly required' if they are required of all employees in the same status at the same time in the same organization unit.

...(b) If the decision is that the employee has not complied with the terms of this agreement, his seniority and employment under the Rules and Working Conditions Agreement shall be terminated within twenty calendar days of the date of said decision except as hereinafter provided or unless the carrier and the organization agree otherwise in writing.

...(c) If within ten calendar days after the date of a decision on appeal by the highest officer of the carrier designated to handle appeals under this agreement in the organization or the employee involved requests such highest officer in writing by Registered or Certified mail, Return Receipt Requested, that a neutral be appointed to decide the dispute, a neutral person to act as sole arbitrator to decide the dispute shall be selected by the highest officer of the carrier designated to handle appeals under

this agreement or his designated representative, the Chief Executive of the organization or his designated representative, and the employee involved or his representative. If they are unable to agree upon the selection of a neutral person any one of them may request the Chairman of the National Mediation Board in writing to appoint such neutral. The carrier, the organization and the employee involved shall have the right to appear and present evidence at a hearing before such neutral arbitrator. Any decision by such neutral arbitrator shall be made within thirty calendar days from the date of receipt of the request for his appointment and shall be final and binding upon the parties. The carrier, the employee, and the organization shall be promptly advised thereof in writing by Registered or Certified mail, Return Receipt Requested. If the position of the employee is sustained, the fees, salary and expenses of the neutral arbitrator shall be borne in equal shares by the carrier and the organization; if the employee's position is not sustained, such fees, salary and expenses shall be borne in equal shares by the carrier, the organization and the employee.

"Section 10.

(a) The carrier party to this agreement shall periodically deduct from the wages of employees subject to this agreement periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership in such organization, and shall pay the amount so deducted to such officer of the organization as the organization shall designate; provided, however, that

the requirements of this subsection (a) shall not be effective with respect to any individual employee until he shall have furnished the carrier with a written assignment to the organization of such membership dues, initiation fees and assessments, which assignment shall be revocable in writing after the expiration of one year or upon the termination of this agreement whichever occurs sooner.

"Section 11.

This agreement shall become effective on March 1, 1953, and is in full and final settlement of notices served upon the carrier by the organizations, signatory hereto, on or about February 5, 1951. It shall be construed as a separate agreement by and on behalf of those employees represented by each organization. this agreement shall remain in effect until modified or changed in accordance with the provisions of the Railway Labor Act, as amended."

Statement of Facts

The employee, C. R. Davies, first entered the service of the Carrier, Off-Line Traffic office at Atlanta, Georgia on March 1, 1983. Mr. Davies was assigned to the position of Chief Clerk.

After receiving the seniority roster for the Off-Line Traffic offices on April 7, 1986, General Chairman P. T. Trittel wrote

Carrier requesting the address of Mr. C. R. Davies so that the organization's office could notify him of his responsibility to join the Union. Carrier responded to the General Chairman's letter on April 14, 1986.

Then by letter dated April 16, 1986, the General Chairman notified Mr. Davies that he was required to join the Organization, under the Union Shop Agreement, within sixty (60) days. The total amount that Mr. Davies owed, up to and including May 1986, was $1,312.80.

Mr. Davies responded to the General Chairmen's letter on March 3, 1986. He had enclosed a partial payment of $84.80 along with membership application and an altered Wage Assignment Authorization to begin dues check-off.

By letter dated May 5, 1985, Mr. Davies once again wrote to the General Chairman

advising that he had mailed a check to the General Secretary-Treasurer, to cover initiation fee and June's dues along with a membership application and authorization form for payroll deduction. He went on to state that he felt he should not be expected to pay for the lack of communication between the Carrier and the Organization.

By letter dated May 6, 1986, General Secretary-Treasurer returned Mr. Davies' check, membership application and Wage Assignment Authorization advising him that the Organization could not accept partial payment and that if he was unable to pay the total amount before May 19, 1986, arrangements could be made for a payment plan.

On May 12, 1986, General Chairman Trittel responded to Mr. Davies' letter of May 5, 1986. General Chairman Trittel

pointed out that the Organization was aware that Mr. Davies had known of his obligation to join the Union since 1983. In his letter, Mr. Trittel stated in part:

"May I remind you that you called me personally in April of 1986 inquiring about the VSP (Voluntary Separation Program) on the Southern Pacific Company. I asked you if you were a covered join and you responded that you were exempt. I asked you if you paid dues and you responded by stating, 'I've never had them taken out of my check.' After this conversation, I discovered that you were on the Off-Line Traffic office roster as a covered employee under the Agreement. Immediately, I wrote H. A. Shiver concerning the addresses of two employees- you and Mr. Povirk. It was on April 14, 1986, that I received you mailing address and sent you the letter to join our Organization.

"You stated that you had talked to Houston Industrial Relations and were advised that the Union has received copies as the Off-Line Roster was updated. This is incorrect! The only copy of an Off-Line Roster that I have received since I have been General Chairman was on April 7, 1986."

On June 17, 1986, General Chairman Trittel advised Mr. H. A. Shiver, Manager, Labor Relations, that Mr. C. R. Davies had

failed to comply with the terms of the Union Shop Agreement of January 21, 1953. In his letter, he explained that Mr. Davies had not joined nor maintained his dues in the organization.

Mr. Shiver responded by letter dated June 24, 1986 by advising General Chairman Trittel that notification of Mr. Davies' failure to comply with the terms of the Union Shop Agreement was improperly directed to him and should have been directed to Mr. J. J. Sternagle, Acting Assistant Vice President, Sales.

General Chairman Trittel advised Mr. Sternagle on June 27, 1986, of Mr. Davies' failure to comply with the Union Shop Agreement.

By letter dated July 2, 1986, Mr. Sternagle advised Mr. Davies that he had received from the General chairman notification of Davies' alleged failure to

comply with the terms of the Union Shop Agreement. This letter was hand delivered to Mr. Davies and signed for by him on the same date.

On July 11, 1986, Mr. Davies requested a hearing as accorded him in Section 5 of the Union Shop Agreement. Mr. Sternagle responded to this request, same date, by advising Mr. Davies that a hearing was scheduled for 9:30 a.m., Thursday, July 31, 1986, in Atlanta, Georgia.

The hearing began at 9;33 a.m., July 31, 1986, and concluded at 12:15 p.m. that same date. Present at this hearing were Mr. C. R. Davies; Ms. McKinney, Mr. Davies attorney; P. T. Trittel, General Chairman; Art Smith, District Sales Manager; and J. J. Sternagle.

By letter dated August 20, 1986, Mr. Sternagle rendered decision that Mr. Davies had not complied with the terms of

the Union Shop Agreement. He also advised Mr. Davies of the next step to be taken if he wished to appeal this decision.

On August 27, 1986, Mr. Shiver advised General chairman Trittel that Mr. Davies had appealed Mr. Sternagle's decision.

Then on August 28, 1986, Mr. Shiver informed Mr. Davies that it was also his decision that Mr. Davies had not complied with the terms of the Union Shop Agreement.

In conclusion, most of the facts in this matter are undisputed. There is no dispute that Carl Davies came to work for Southern Pacific with a seniority date of March 1, 1983. There is no dispute that the Employer and the Union have entered into a Union Shop Agreement which is applicable to the situation herein. Further undisputed is the fact that Carl Davies did not pay dues to BRAC until May

1986 at which time one month's dues and the initiation fee which was returned by BRAC as full payment of $1,312.80 was demanded.

BRAC then notified the Employer that Carl Davies should be terminated due to the fact that he had not complied with the Union Shop Agreement. The Employee contends that if he is to be held to strict compliance with the Union Shop Agreement, then BRAC and the Employer should also be required to strictly comply; and, therefore, bear the burden occasioned by their lack of compliance.

Organization's Position

It is the position of the Organization that Mr. C. R. Davies, Chief Clerk, Southern Pacific Transportation Company, Atlanta, Georgia, failed to comply with the Union Shop Agreement when he failed to become a member and maintain membership in

this organization. There is no dispute whatsoever concerning the fact that Mr. Davies, after being duly notified, still failed to comply with the terms and conditions of the Union Shop Agreement.

Mr. Davies has confined his defense to the argument that there was a lack of communication between the Union and the Carrier and that he feels the Union has also been negligent in contacting him of this obligation to join the Organization --his letter of May 5, 1986. The Organization contends that they were not notified by the Carrier as required by Article IX (Rule 3) of the National Agreement signed July 23, 1975, as to his hiring date, home address, social security number, or employee identification number within thirty (30) days of the date Mr. Davies was employed. Article IX reads as follows:

15(a)

Employee Information

"Commencing December 1975, the carriers will provide each General Chairman with a list of employees who are hired or terminated, their home addresses, and social security numbers if available, otherwise the employees' identification numbers. This information will be limited to the employees covered by the collective bargaining agreement of the respective General Chairman. The data will be supplied within 30 days after the month in which the employee is hired or terminated. Where railroads cannot meet the 30-day requirement, the matte will be worked out with the General Chairman."

The Organization contends it moved immediately to contact Mr. Davies when it was discovered that he was not a member of the Organization. An employee holding a position which comes under the Union Shop Agreement is personally charged with compliance with its terms and insofar as such an agreement is concerned the employee hold the keys to the door of his continuing employment eligibility.

The Organization concludes that under no circumstances may an employee be

permitted to not pay the proper back dues.

Carrier's Position

The Carrier contends it has complied with the terms of the Union Shop Agreement and has abided with the letter and intent of such an agreement. It avers that it is cognizant of that portion of Section 5(a) reading:

"(a) Each employee covered by the provision of this agreement shall be considered by the carrier to have met the requirements of the agreement unless and until it is advised to the contrary in writing by the Organization..."

The Carrier avers that it has not arbitrarily conducted investigations in any manner to determine affiliation or non-affiliation of employees with any labor organization but has been diligent in its attempt to remain neutral between the employees and the Organization in disputes of this character. In accordance with that policy, the Carrier has not taken sides with either the employee or

the Brotherhood in the instant case.

Grievant's Position

The Grievant contends that neither the Union nor the Employer fully complied with the Agreement. however, they both seek to force the Grievant to fully comply. This type of selective compliance is inherently and patently unfair. The Grievant avers that since neither of them complied, let them bear the burden of non-compliance--the payment of back dues.

The Grievant concludes that he stands ready to join the Union and pay his initiation fee and future dues. He avers that at no time has he refused to join the Union. He admits that the Union has suffered a loss of dues, but that burden should not be borne by him. Grievant contends that both the employer and the Union failed to comply with the Agreement and they should jointly or severally bear

the burden for their lack of compliance.

Opinion

The record indicates that the Employer submitted a Seniority Date Order dated January 1, 1984, to BRAC, which listed Carl Davies as an employee. This prompted a letter from Mr. Trittel at BRAC on April 17, 1984, acknowledging that the list was received but pointing out that the Agreement required the Carrier to include home addresses and social security numbers and advising the Carrier that they were not in compliance with the Agreement. Mr. Shiver, on behalf of the Employer, responded to Mr. Trittel's letter on May 24, 1984, sending him a print-out entitled "Record of New or Change in Status of Employees" for April 1984. Although this list does provide social security numbers, no home addresses were supplied.

The record also indicates that the

Employer prepared lists which were forwarded to Brac in 1985 and 1986. It would appear that the first time BRAC was notified of Carl Davies' home address was in a letter from Mr. Shiver dated April 14, 1985.

It is clear that on June 30, 1986, notice dated June 27, 1986 was received that the Chief Clerk Carl R. Davies had failed to comply with the terms of the Union Shop Agreement for reason that he failed to maintain his membership in the Organization representing his craft or class, the BRAC.

The Carrier notified Mr. Davies, within 10 calendar days, in accordance with Section 5(a) of the Union Shop Agreement, that the Brotherhood had advised the Company he had failed to comply with the terms of the Union Shop Agreement because he had failed to maintain membership in

the Brotherhood. Within ten calendar days thereafter, the employee requested Assistant Vice President Sales J. J. Sternagle to afford him a hearing in which he could dispute the fact that he had failed to comply with the terms of the Agreement. Upon receipt of such request, the Carrier and the Brotherhood agreed upon a date of July 31, 1986. The hearing for Chief Clerk Davies was held on July 31, 1986, by Assistant Vice President-Sales, J. J. Sternagle.

On August 20, 1986, Mr. Davies was notified that on the basis of the evidence produced at the hearing, it was the decision of the carrier that he had failed to comply with the terms of the Union Shop Agreement.

H. A. Shiver, is Manager Labor Relations, and as such, is the Carrier's highest officer designated to handle

appeals under Section 5 (b) of the Union Shop Agreement of January 29, 1953. On August 26, 1986, Chief Clerk Carl R. Davies appealed Assistant Vice President-Sales Sternagle's decision to Manager Labor Relations Shiver on the basis that his decision was not satisfactory, inasmuch as the penalty of dismissal was too severe.

After reviewing all evidence in the record, the Manager of Labor Relations wrote Mr. Davies and stated that it was Carrier's decision, on appeal under Section 5(b) of the Union Shop Agreement, that he had failed to comply with the terms of the Union Shop Agreement.

Section 1 of the Union Shop Agreement provides in part that "all employees of the Carrier now or hereafter subject to the rules and working conditions agreements between the parties hereto...

shall as a condition of their continued employment subject to such agreement, become members of the Organization, party to this agreement representing their craft or class...and thereafter shall maintain membership in such Organization."

Section 4 provides in part:

"Nothing in this agreement shall require an employee to become and to remain a member of the Organization if such membership is not available to such employee upon the same terms and conditions as are generally applicable to any other member, or if the membership of such employee is denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees and assessments...universally required as a condition of acquiring or retaining membership."

The failure of employees to maintain the payment of their dues current is considered a violation of the above quoted portions of the Union shop Agreement and makes them subject to dismissal.

A review of the transcript of the investigation covering the case of Chief

Clerk Davies, shows that he was notified by the Brotherhood that he was delinquent in dues and it was the policy of the Brotherhood to decline money payments offered by individuals after they had been properly cited to management for failure to comply with the provisions of the Union Shop Agreement. Mr. Davies, testified he was notified of requirement to make payment under the Union Shop Agreement, that a check was sent in amount of $84.80 for one month, plus initiation fees, and that he was subsequently notified that the amount tendered was improper. Additionally, Mr. Davies testified he received notification that altering of the Wage Assignment Form was not acceptable.

Mr. Davies testified he received a letter from the Organization dated May 6, 1986, to the effect that if proper payment was not made, he would be terminated,

"Union Shopped."

Mr. Davies made these:

"I had a general idea what Union Shop was, yes. It would be a termination of my position."

When asked by BRAC Division Chairman Trittel if he realized how serious this really was and it could cause him to lose his position with the Southern Pacific Company, Mr. Davies further stated he did not send any money in other than what was originally sent and that no extension of time was requested in order that he make the payments.

This is a clear admission from Mr. Davies that he failed to maintain proper payment of his dues and it was incumbent upon the Carrier to rule that he had failed to comply with the terms of the Union Shop Agreement.

Upon review of the records, we conclude

that there is no question but that Mr. Davies was required to pay dues of this Organization within 60 calendar days of the date he first performed compensated service under the Rules and Working Conditions Agreement as set forth in Section 1 of the Union Shop Agreement and that such provisions further required him to maintain such membership.

Mr. Davies failed to fulfill his obligations under the terms of the Union Shop Agreement and continued to fail to comply with such terms after being duly notified and of the consequences thereof for his continued failure.

The record indicates that the Organization notified Mr.Davies of his obligation upon discovering that he was in noncompliance with the terms of the Union Shop Agreement.

The record indicates that the

Organization endeavored to accommodate him in establishing a payment plan if he so wished.

Mr. Davies refused to place himself in compliance with the Union Shop Agreement even after being forewarned of the consequences of his actions.

The record indicates that the Organization has treated Mr. Davies identically to other employees and upon the same terms and conditions applied to other employees in like status as required by Section 4 of the Union Shop Agreement.

Pursuant to the provision of the Union Shop Agreement, Mr. Davies' employment relationship is vulnerable.

Therefore upon review of all the evidence, we conclude that Grievant has enjoyed the benefits of representation. The question at issue is answered in the affirmative. However, due to the faulty

communication between Employer and Organization, the employee is granted sixty days to bring himself into full compliance with dues schedule and back payments of all monies owed. One half-payment is due in thirty days; second half-payment is due within sixty days. The request for lawyer fees is denied.

Award

Grievance denied. Grievant has sixty (60) days to bring himself into full compliance with dues schedule and back payments of all monies owed. Failure to comply with the provisions of this award and of the Union Shop Agreement by March 16, 1987, will terminate Mr. Davies' employment relationship.

Frances X. Quinn

Tulsa, Oklahoma

January 15, 1986.

APPENDIX B

Decision of the

United States District Court

for the

Northern District of Georgia

in

Carl R. Davies v. Southern Pacific Transportation Company and Brotherhood Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees

---

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

Carl R. Davies,

Plaintiff,

V. Civ. No.

Southern Pacific Transportation Co. and Brotherhood of Railway, Airline, and Steamship Clerks, Freight Handlers, Express and Station Employees, 1:87-Cv-1836 HTW

Defendants.

MEMORANDUM DECISION AND ORDER

WARD, District Judge

This matter is pending before the court on Plaintiff's Motions to Extend Time and to Extend Discovery; Defendants' Motions for Summary Judgment;[1] and Defendant Southern Pacific's Motion for Sanctions. Plaintiff's Motion to Extend Time for

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[1] Defendant BRAC moves, in the alternative, to dismiss.

filing his response to the Motions for Summary Judgment is not opposed and is, for good cause shown, GRANTED. Plaintiff's response to the Motions for Summary Judgment is accordingly deemed timely filed.

Plaintiff's Complaint alleged that the Brotherhood of Railway, Airline, and Steam Ship Express and Station Employees [BRAC] breached its duty of fair representation toward him. He also claimed that Southern Pacific wrongfully discharged him and engaged in bad faith bargaining with him.

MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is only proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Warrior Tombigbee Transportation Co., Inc. v. M/V NAN FUNG, 695 F.2d 1294, 1296 (11th Cir.

1983); Fed.R.Civ.P. 56 (c). The court must review the evidence and all factual inferences from that evidence in the light most favorable to the party opposing the motion. Sweat v. Miller Brewing Co., 708 F.2d 655, 656 (11th Cir. 1983).

FACTS

The following facts are not in dispute: Southern Pacific is a railroad engaged in interstate commerce and is a carrier as defined in Section 1, First of the Railway Labor Act, 45 U.S.C.A. Section 151, First (West). Several decades ago, Southern Pacific and BRAC entered into a union shop agreement covering certain designated positions of employment. Under the agreement, an employee's failure to join BRAC within sixty days after he begins work or to subsequently pay his BRAC dues makes him subject to dismissal. On March 1, 1983, plaintiff was hired by Southern

Pacific to fill the position of Chief Clerk. This position was one which was covered by the union shop agreement. BRAC became aware at some point that plaintiff was in a union shop position but has not joined BRAC and paid its dues. In an April 16, 1986 letter, BRAC notified plaintiff that under the union shop agreement he had been required to join the union and that he owed $1,312.80 in back dues and initiation fees.

Plaintiff tendered the initiation fee and current dues to BRAC, along with a membership application, but refused to pay dues for the previous time he had worked at Southern Pacific. BRAC returned plaintiff's check and application. It advised him that it would not accept partial payment but if he was unable to pay the entire amount right away a payment plan could be arranged. It also told him that

if he did not pay the amount BRAC claimed was due he would be "union shopped," i.e., discharged.

The union shop agreement provides for hearing with Souther Pacific concerning grievances; plaintiff requested and received such a hearing. After the hearing, Southern Pacific's agent found plaintiff had not complied with the union shop agreement. The union shop agreement also provides that disputes can be presented to a neutral arbitrator. An arbitrator was selected and an arbitration hearing held. The issue decided by the arbitrator was "whether pursuant to the provisions of the Union Shop Agreement [plaintiff's] employment relationship should be terminated." The arbitrator concluded that plaintiff had failed to comply with the union shop provisions of the agreement by refusing to remit to BRAC

the full amount of the delinquent dues. The arbitrator also ordered that "due to the faulty communication between [Southern Pacific] and [BRAC], the employee is granted sixty days to bring himself into full compliance with dues schedule and back payments of all monies owed."

In a letter plaintiff received on January 24, 1987, BRAC advised plaintiff of the arbitrator's decision and requested that plaintiff comply with the award or face discharge. The letter stated that half of the money due had to be paid by February 16 and the other half had to be paid by March 16th. Plaintiff notified Southern Pacific in a February 23, 1987 letter that he had resigned from employment effective February 16, 1987.

Plaintiff argues that the undisputed facts are not the only relevant facts. He presents evidence which, when considered

in the light most favorable to the plaintiff, indicates that when he was hired by Southern Pacific he was not told that his position was a union shop position; when he was hired he inquired whether the position required union membership and was told that if it did the union would contact him; he did not learn he was required to join the union until he received the April 1986 letter from BRAC; while employed, he was treated as an employee exempt from membership, e.g., he did not receive the scheduled union raises nor was he paid for overtime. Plaintiff's evidence also indicates that although the union shop agreement requires Southern Pacific to provide BRAC with certain information about newly hired employees within thirty days of hire and also requires that BRAC then has the duty of notifying newly hired employees that they

are required to join the union, he was not notified that he was required to join the union until several years after he was hired. Plaintiff's evidence indicates further that after the arbitration hearing he offered to pay the full amount of dues claimed if he could receive lump-sum compensation for benefits he would have received if he had been treated as a union employee from the time he started with Southern Pacific. BRAC informed him that only benefits which had accrued in the last sixty days could be paid.

DISCUSSION

The applicable statute of limitations in this case provides that a complaint must be filed within six months after the statute begins to run. See West v. Conrail, 107 S.Ct. 1538, 1540-41, 95 L.Ed.2d 32 (1987). "[T]he timeliness of the suit must be measured from the date on

which the employee knew or should have known of the union's final action or the date on which the employee knew or should have known of the employer's final action, whichever occurs later." Proudfoot v. Seafarer's Int'l Union, 779 F.2d 1558, 1559 (11th Cir. 1986). "By final action we mean the point where the grievance procedure was exhausted or otherwise broke down to the employee's disadvantage." Id.; see Hester v. International Union of Operating Engineers, 818 F.2d 1537, 1548 (11th Cir.), clarified on other grounds 830 F.2d 172 (11th Cir. 1987).

Plaintiff concedes that a six month limitations period is applicable and that the standards established in Proudfoot and Hester determine when this period begins to run. He argues, however, that the limitations period only began to run on March 16, 1987, because BRAC told him

that he had until March 16 to pay the amounts due under the arbitrator's order. He argues, in the alternative, that the earliest date upon which the period of limitations could have begun to run was February 23, 1987, the date he submitted his resignation.

It is apparent that the date upon which plaintiff knew or should have known that the grievance procedure he had pursued concerning his dispute had been exhausted or had been concluded adversely to him was January 24, 1987, when he received notice of the arbitrator's adverse decision. Plaintiff's complaint was not filed until August 19, 1987 and was thus outside of the six month statute of limitations.[2]

---

[2] Even if plaintiff's argument is accepted that the limitations period only began to run upon the date the payment ordered by the arbitrator was due, plaintiff's complaint was filed outside the limitations period. Under the terms of the arbitrator's order and the BRAC letter, plaintiff's first payment was due

Plaintiff's action is therefore barred by the statute of limitations.

It also appears that the plaintiff's action is subject to summary judgment on substantive grounds. As Southern Pacific argues, the exclusive remedy for the type of claims plaintiff makes is the administrative procedure plaintiff has already pursued. "A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding." Andrews v. Louisville & Nashville R.R. Co., 406 U.S. 320, 325, 92 S.Ct. 1562, 1565, 32 L.Ed.2d 95 (1972). Defendants' motions for summary judgment are accordingly GRANTED.

REQUEST FOR SANCTIONS

Southern Pacific has moved for

February 16. Plaintiff's complaint was not filed until six months and three days later.

imposition of sanctions pursuant to Federal Rule of Civil Procedure 11. It argues that this action is frivolous. Although the court has determined that defendants' motions for summary judgment are meritorious, this does not dictate imposition of sanctions. Rule 11 provides, in relevant part, that an attorney's signature on a complaint constitutes a certificate by the attorney "that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Fed.R.Civ.P. 11. The court declines to impose sanctions in this case. Plaintiff has advanced non-frivolous arguments in opposition to the motions for summary judgment. Southern

Pacific's motion for Rule 11 Sanctions is DENIED.

MOTION TO ENLARGE DISCOVERY PERIOD

Plaintiff's motion to enlarge the time for discovery states that in the event defendants' motion for summary judgment are denied, plaintiff would need additional time to conduct discovery. This motion is accordingly DENIED as MOOT.

CONCLUSION

It is hereby ORDERED that defendants' motions for summary judgment are GRANTED; the clerk of the court is DIRECTED to enter judgment in favor of the defendants against the plaintiff. Plaintiff's motion for an extension of time to respond to the motions for summary judgment is GRANTED. Plaintiff's motion to enlarge the discovery period is DENIED as MOOT.

APPENDIX C

Decision of the

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

in

Carl R. Davies v. Southern Pacific Transportation Company and Brotherhood Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees

---

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-8610

D.C. Docket No. 1:87-1836

Carl R. Davies,

Plaintiff-Appellant, Cross-Appellee

versus

Southern Pacific Transportation Company,

Defendant-Appellee, Cross-Appellant,

Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees,

Defendants-Appellees.

Before KRAVITCH, JOHNSON and ANDERSON, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern

District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiff-appellant, cross-appellee pay to defendant-appellee, cross-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: July 21, 1989

Issued as Mandate: August 14, 1989

No. 89-655

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CARL R. DAVIES,

Petitioner,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY and BROTHERHOOD OF RAILWAYS, AIRLINE, AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS and STATION EMPLOYEES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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LIST OF CORPORATE SUBSIDIARIES AND AFFILIATES

WHOLLY OWNED SUBSIDIARIES OF RESPONDENT SOUTHERN PACIFIC TRANSPORTATION COMPANY

Evergreen Leasing Corporation
Los Angeles Union Terminal, Inc.
Northwestern Pacific Railroad Company
Pacific Fruit Express Company
Pacific Motor Transport Company
St. Louis Southwestern Ry. Co.
Dallas Terminal Ry. and Union Depot Co.
The Southwestern Town Lot Corp.
Southern Pacific Air Freight, Inc.
Southern Pacific Equipment Company
Southern Pacific International, Inc.
Southern Pacific Marine Transport, Inc.
Southern Pacific Motor Trucking Company
Southern Pacific Telecommunications Company
Southern Pacific Warehouse Company
Visalia Electric Railroad Company

NON-WHOLLY OWNED SUBSIDIARIES OF RESPONDENT SOUTHERN PACIFIC TRANSPORTATION COMPANY

Central California Traction Company
The Ogden Union Ry. & Depot Co.
Portland Terminal R.R. Co.
Portland Traction Company
Sunset Railway Company
Trailer Train Company
The Alton & Southern Ry. Co.
Arkansas & Memphis Railway Bridge and Terminal Company
Kansas City Terminal Railway Co.
Southern Ill. and Mo. Bridge Co.
Terminal R.R. Assoc. of St. Louis
Trailer Train Company

PARENT COMPANY OF RESPONDENT SOUTHERN PACIFIC TRANSPORTATION COMPANY

SPTC Holding, Inc.

TABLE OF AUTHORITIES

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No. 89-655

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CARL R. DAVIES,

Petitioner,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY and BROTHERHOOD OF RAILWAYS, AIRLINE, AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS and STATION EMPLOYEES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Southern Pacific Transportation Company and Brotherhood of Railway, Airline, and Steamship Clerks, Freight Handlers, Express and Station Employees respectfully request this Court to deny the Petition for Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Eleventh Circuit.

STATEMENT OF THE CASE

A. *Course of Proceedings and Disposition Below.*

On August 19, 1987, Petitioner Carl R. Davies ("Mr. Davies") filed a civil action in the United States District Court for the Northern District of Georgia against Respondents Southern Pacific Transportation Company ("Southern Pacific") and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees ("BRAC"). Mr. Davies alleged a breach of contract by Southern Pacific and a breach of the duty of fair representation by BRAC. In February 1988, Southern Pacific and BRAC filed motions for summary judgment. On July 7, 1988, the district court granted Respondents' motions for summary judgment and dismissed all of Mr. Davies' claims. The court held that Mr. Davies' action was time-barred because it was not filed within the applicable six-month limitations period. As an independent basis for its judgment, the court held that Mr. Davies' action was substantively barred by the exclusive administrative remedy provisions of the Railway Labor Act.

Petitioner filed a Notice of Appeal from the district court's judgment on August 10, 1988. The Eleventh Circuit Court of Appeals affirmed the district court's judgment without opinion. The court of appeals determined that the granting of summary judgment was supported by the record and that an opinion would have no precedential value pursuant to Eleventh Circuit Court Rule 36.1. Subsequently, on October 15, 1989, Mr. Davies filed in the Supreme Court of the United States a Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

B. *Statement Of The Facts.*

The facts in this matter are largely undisputed. Effective March 1, 1953, Respondents Southern Pacific and BRAC en-

tered into a Union Shop Agreement covering certain designated positions of employment, including positions in off-line offices.[1] Under the Agreement, failure of an employee to maintain his membership in BRAC by paying union dues is a violation subjecting the employee to dismissal. Petitioner was hired by Respondent, Southern Pacific, on March 1, 1983, as a chief clerk in Southern Pacific's off-line traffic office in Atlanta, Georgia, which was a position covered under rule "1(C)" of the Collective Bargaining Agreement and specifically covered under the Union Shop Agreement. At some subsequent date, BRAC became aware that Mr. Davies was employed in a union shop position but had not joined BRAC or paid his union dues. By letter dated April 16, 1986, BRAC notified Petitioner that the terms of the Union Shop Agreement required him to join the union, and that he owed $1,312.80 in back dues and initiation fees. Mr. Davies then responded by tendering the initiation fee and current dues to BRAC, along with a membership application, but refused to pay back dues as requested by BRAC. BRAC advised Mr. Davies by letter dated May 6, 1987, that it refused to accept his partial payment, but offered to arrange a payment plan if Mr. Davies was unable to pay the entire amount of his back dues at that time.

On June 27, 1986, Southern Pacific received notice from BRAC that Mr. Davies had failed to comply with the terms of the Union Shop Agreement by failing to pay his dues to maintain his membership in BRAC. In accordance with Section 5(a) of the Union Shop Agreement, within ten calendar days Southern Pacific notified Mr. Davies that BRAC had advised the company that Mr. Davies had failed to comply with the Union Shop Agreement by failing to maintain membership in BRAC.

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[1] An "off-line" office is simply an office not located at a Southern Pacific facility on a rail line operated by Southern Pacific.

Within ten days, Mr. Davies requested Southern Pacific to afford him a hearing, so that he could dispute the alleged failure to comply with the Union Shop Agreement.

The requested hearing was held on July 31, 1986, before Southern Pacific's Assistant Vice-President-Sales, J. J. Sternagle. Mr. Davies was represented by his current counsel, Ms. Jan McKinney. On August 20, 1986, Southern Pacific notified Petitioner that, on the basis of the evidence produced at the hearing, Mr. Sternagle of Southern Pacific had decided Petitioner had failed to comply with the Union Shop Agreement.

Petitioner appealed Mr. Sternagle's decision to Mr. H. A. Shiver, Manager of Labor Relations for Southern Pacific, and its highest officer designated to handle appeals under the Union Shop Agreement, Section 5(b). Mr. Shiver reviewed all the evidence and informed Mr. Davies that Southern Pacific's decision on appeal was that he had failed to comply with the terms of the Union Shop Agreement.

Within the time provided by Section 5(c) of the Union Shop Agreement, Petitioner's attorney, Ms. McKinney, requested that a neutral mediator be appointed to decide the dispute. The National Mediation Board appointed Dr. Frances X. Quinn, who conducted an arbitration hearing December 9, 1986. At that time he heard evidence from Mr. Davies, BRAC and Southern Pacific, and also received statements and exhibits. Petitioner was once again represented by attorney McKinney. Petitioner's defense during arbitration was limited to the argument that because neither Southern Pacific nor BRAC had fully complied with the notification provisions of the Union Shop Agreement, resulting in a delayed notification to Petitioner of his obligation to pay dues to the union, Petitioner should not be required to comply with the Union Shop Agreement by paying back dues.

On January 6, 1987, Dr. Quinn issued a written opinion and award setting forth findings and conclusions supporting his denial of Mr. Davies' grievance.[2] Dr. Quinn found that Petitioner had been treated identically to other employees as provided by the Union Shop Agreement, and had enjoyed the benefits of representation. Dr. Quinn further found Petitioner in clear violation of the Union Shop Agreement for failure to pay dues, despite the fact that BRAC had offered to accommodate him with a payment plan, and that Mr. Davies had been forewarned of the consequences of failure to pay the dues. Dr. Quinn found that Petitioner's failure to pay was mitigated somewhat by "faulty communication" between Southern Pacific and BRAC. Therefore, Dr. Quinn gave Petitioner one last chance to bring himself into full compliance by paying all dues and back payments owed in two installments, the first to be paid within thirty days of the decision. Under the award, failure to pay would subject Petitioner to termination.

Petitioner acknowledged receipt of the arbitration award by letter to Mr. Trittel of BRAC on January 22, 1987. Petitioner further received letters from BRAC on January 24, 1987, and February 7, 1987, demanding that Mr. Davies comply with the arbitrator's award or face discharge. Mr. Davies chose not to comply with the arbitrator's award, and instead submitted his letter of resignation dated February 23, 1987, notifying Southern Pacific that he had resigned from employment effective February 16, 1987, the date his first payment of back dues had been due under the award. At no time prior to the issuance of the arbitrator's award on or about January 6, 1987, or thereaf-

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[2] The cover letter sent with the award, addressed to Petitioner, as well as his counsel, Ms. McKinney, and BRAC and Southern Pacific representatives, is dated January 6, "1986" [sic]. The award itself was mistakenly dated "January 15, 1986."

ter did Petitioner object to the timeliness of the award, and in fact the award was mailed less than thirty days after the date the arbitration hearing was held.

On August 19, 1987, more than six months after the arbitrator's award was issued, and also more than six months after the effective date of Petitioner's resignation from Southern Pacific's employment, Petitioner filed his Complaint. The Complaint was framed simply as a claim against Respondent Southern Pacific for wrongful discharge of Mr. Davies pursuant to the Union Shop Agreement and against Respondent BRAC for breach of duty of fair representation for failing to timely notify Mr. Davies of his obligation to pay dues, and refusing to accept his tender of partial dues. Petitioner's Complaint made no mention of the fact that arbitration had already been conducted concerning these very issues, and that arbitration had resulted in an award against him. In addition, Petitioner did not ask the court to review the arbitrator's award pursuant to 45 U.S.C. § 153 First (q), nor did he allege any improper action by the arbitrator in violation of that or any other section of the Railway Labor Act. Petitioner did not allege that any wrongful conduct on the part of BRAC or Southern Pacific had "tainted" the arbitration process in any way. Petitioner simply framed his complaint so as to have the district court relitigate the very issues which had already been litigated by the arbitrator unfavorably to Petitioner's position. After both Respondents filed motions for summary judgment, Petitioner, in his responses to those motions, admitted that there had been a previous arbitration resulting in an award against him, and urged the district court to review the merits of that award.

SUMMARY OF ARGUMENT

This case is not a proper one for the Court's exercise of discretion in granting a Writ of Certiorari. The law applicable to the facts of this case is clear and straight forward and was properly applied by the courts below. This case is not one which presents a special or important reason for this Court's review.

Petitioner's claim is time barred by the six month statute of limitations established in *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151 (1983) which applies in hybrid fair representation/breach of contract actions. There is no conflict among the various circuit courts as to the application of the six month statute of limitations to such a claim, nor is there conflict as to when the statute of limitations accrues and/or is tolled. The "discovery doctrine" is the standard rule of accrual applicable to federal statute of limitations. Discovery, in the context of hybrid cases such as the one before this Court, is when the plaintiff learns of the union and employer's actions which trigger the plaintiff's complaint, or learns of the union's inaction in response to an alleged breach of contract by the employer.

In certain instances, the statute of limitations will be tolled to further the policy in favor of non-judicial resolution of labor disputes. Such tolling may occur while the employer and the union, on the plaintiff's behalf, exhaust the contractual grievance/arbitration procedures. In this case, the statute of limitations did not begin to run until the arbitrator made his decision which exhausted the contractual grievance/arbitration procedure. Petitioner's complaint was not filed within six months of the arbitrator's award nor was it filed within six months of the date that the first payment ordered by the arbitrator was due. Petitioner erroneously asks this Court to review the district court's findings of fact and proper application of the six month statute of limitations barring his claim, as well as, the

court of appeals' affirmation of the holding. This issue is not an appropriate one for the granting of a Writ of Certiorari by this Court.

Petitioner's request of this Court is, additionally, improper because federal courts have no jurisdiction under the Railway Labor Act to hear issues de novo which have been litigated in arbitration. One of the major purposes of the Railway Labor Act is to provide prompt and orderly settlement of all minor disputes. Minor disputes are those which grow out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions. The Railway Labor Act provides a comprehensive system for settlement of such minor disputes by the use of compulsory arbitration. As an alternative reason for dismissal, the district court properly determined that Petitioner's claim was barred because the only forum for his claim was arbitration which he had already pursued. The court of appeals properly affirmed the district court's decision to dismiss Petitioner's claim on both grounds. Petitioner's claim was time barred by the six month statute of limitations and was foreclosed by the district court's lack of jurisdiction over such a claim.

ARGUMENT

I. THIS COURT SHOULD NOT REVIEW THE LOWER COURTS' APPLICATION OF THE *DELCOSTELLO* LIMITATIONS PERIOD TO A HYBRID FAIR REPRESENTATION/BREACH OF CONTRACT CASE, INCLUDING THE DETERMINATION OF WHEN THE LIMITATIONS PERIOD ACCRUED AND/OR WAS TOLLED, SINCE THERE IS NO CONFLICT IN THE CIRCUITS AS TO THESE PRINCIPLES AND PETITIONER SIMPLY DISAGREES WITH THE FACTUAL FINDINGS OF THE DISTRICT COURT AND THE MANNER IN WHICH IT CORRECTLY

APPLIED THESE WELL ESTABLISHED LIMITATION PRINCIPLES TO THE FACTS OF THIS CASE.

A. There Is No Conflict In The Circuits As To When The Six Month *DelCostello* Limitation Period Accrues And/Or Is Tolled In Hybrid Fair Representation/Breach Of Contract Cases.

Petitioner appears to assert that the circuits are unsettled on the question as to when the six month limitation period set forth in *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151 (1983), begins to run or is tolled in hybrid fair representation/breach of contract actions. In fact, the principles of accrual and tolling as they apply to the *DelCostello* limitations period are well settled. The "disparate holdings" and "multiplicity of decisions in the circuits" cited by Petitioner (Ptn. pp. 12, 21-28) are merely the result of the courts' application of these uniform standards to a myriad of factual circumstances.

The "discovery doctrine" is the standard rule of accrual applicable to federal statutes of limitations. *See Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946); *see also Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1872); *NLRB v. Don Burgess Const. Co.*, 596 F.2d 378, 382-83 (9th Cir. 1979), *cert. denied*, 444 U.S. 940. The discovery doctrine identifies the point at which the federal limitations period begins to run as when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts onstituting the alleged violation. The federal courts uniformly apply this same principle when determining when the *DelCostello* six month limitation period begins to run in hybrid fair representation/breach of contract cases.[3]

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[3] *Alcorn v. Burlington N. R.R. Co.*, 878 F.2d 1105, 1108 (8th Cir. 1989) ("when a claimant knows or should know through an exercise of reasonable diligence of the acts constituting the alleged violation"); *Bartels v. Sports Arena Employees Local 137*, 838 F.2d 101, 105 (3d Cir. 1988) (court rejects plaintiff's conten-

Although this general rule has been consistently applied to "hybrid" cases, the precise point in time at which the six month period begins to run depends entirely on the particular facts of each case. Generally, the point at which plaintiff "becomes aware or should have been aware of" the acts constituting the alleged breach by a union and an employer is when he or she learns of the union and employer's actions which trigger the member's complaint, or learns of the union's inaction in response to an alleged breach of contract by the employer. *See Clift v. U.A.W.*, 818 F.2d 623, 630 (7th Cir. 1987) (cause of action accrued when plaintiffs learned of the contents of a negotiated agreement affecting their recall rights); *Alcorn*, 878

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tion that "the union's allegedly ongoing wrongdoing" excused plaintiff's delay in filing actions); *Arriaga-Zayas v. Int'l Ladies' Garment Workers Union*, 835 F.2d 11, 13 (1st Cir. 1987) (cause of action accrues "when the plaintiff knows, or reasonably should know, of the acts constituting the union's alleged wrongdoing," quoting *Graham v. Bay State Gas Co.*, 779 F.2d 93, 94 (1st Cir. 1985); *Eatz v. DME Unit of Local Union Number 3*, 794 F.2d 29, 33 (2d Cir. 1986) (action accrues "when the union members know or reasonably should know that a breach of that duty has occurred"); *Galindo v. Stoody Co.*, 793 F.2d 1502, 1509 (9th Cir. 1986) ("when an employee knows or should know of the alleged breach of duty"); *Dowty v. Pioneer Rural Elec. Co-Op, Inc.*, 770 F.2d 52, 56 (6th Cir. 1985), *cert. denied*, 474 U.S. 1021 (action accrues "when the claimant knows or should have known of the union's alleged breach"); *Farr v. H. K. Porter Co., Inc.*, 727 F.2d 502, 505 (5th Cir. 1984) ("we look to when the plaintiffs either were or should have been aware of the injury itself, not to when the plaintiffs became aware of one of the injury's many manifestations"); *Benson v. Gen. Motors Corp.*, 716 F.2d 862, 864 (11th Cir. 1983) ("when plaintiffs either were or should have been aware of the injury itself, not . . . when plaintiffs became aware of one of the injury's many manifestations"); *Metz v. Tootsie Roll Indus.*, 715 F.2d 299, 304 (7th Cir. 1983), *cert. denied*, 464 U.S. 1070 (1984) (period begins to run "when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation"); *Cox v. Stanton*, 529 F.2d 47, 50 (4th Cir. 1975) ("[f]ederal law holds that the time of accrual is when plaintiff knows or has reason to know of the injury which is the basis of the action").

F.2d at 1108 (cause of action accrued when plaintiffs learned that union would not pursue their complaint against the employer through the grievance arbitration procedure); *Archer v. Airline Pilots Ass'n*, 609 F.2d 934, 937-38 (9th Cir. 1979), *cert. denied*, 446 U.S. 953 (cause of action accrued when union closed its file on plaintiff's case and refused to pursue a grievance against the employer); *Benson*, 716 F.2d at 863-64 (cause of action accrued when seniority rosters were posted notifying plaintiffs of the union and employer's modification of their seniority rights).

Notwithstanding the consistent application of these accrual principles, the federal courts have recognized that technical time bars may be overcome by equitable considerations. Thus, the federal courts applying the *DelCostello* limitation period to hybrid fair representation/breach of contract actions have invariably held that in order to further the policy in favor of non-judicial resolution of labor disputes, in certain instances, the running of the statute of limitations period in a hybrid case will be tolled while the employer and the union, on the plaintiff's behalf, exhaust the contractual grievance arbitration procedures. The First, Second, Third, Fourth, Sixth, Eighth, Ninth and Eleventh Circuits have all recognized that a plaintiff's hybrid cause of action will not accrue until the contractual grievance/arbitration machinery is fully exhausted. Exhaustion of this procedure is generally deemed to be when the plaintiff receives notice of an adverse arbitration award. *See Ghartey v. St. John's Queens Hosp.*, 869 F.2d 160, 164-166 (2d Cir. 1989); *Beardsley v. Chicago N.W. Transp. Co.*, 850 F.2d 1255, 1265 (8th Cir. 1988); *Childs v. Penn. Fed'n Bhd. of Maintenance Way Employees*, 831 F.2d 429, 434-435 (3d Cir. 1987); *Murray v. Branch Motor Express Co.*, 723 F.2d 1146, 1147-1148 (4th Cir. 1983), *cert. denied*, 469 U.S. 916 (1984); *Galindo v. Stoody Co.*, 793 F.2d 1502, 1508-1510 (9th Cir. 1986). Accrual may occur at some earlier point if the

union refuses to exhaust fully the grievance/arbitration procedures on behalf of the plaintiff.[4]

Since the principle of tolling is an equitable doctrine, in some cases the courts will not accept a plaintiff's tolling argument where the court deems that the equities present weigh against extending the limitations period. Thus, in *Arriaga-Zayas v. I.L.G.W.U.*, 835 F.2d 11, 14-15 (1st Cir. 1987), one reason the court refused to toll the six month statute of limitations during the period the plaintiff's grievance was arbitrated was because, like the instant case, the plaintiff had retained an attorney to represent his interests prior to the arbitration proceeding. Additionally, it was unclear that the arbitration proceeding had any bearing on the claims filed in the plaintiff's hybrid lawsuit; thus, the policy in favor of non-judicial resolution was not served by tolling the six month statute of limitations. *See, Ghartey*, 869 F.2d at 165 and *Childs*, 831 F.2d at 435 (where the courts recognized that the *DelCostello* limitations period will begin to run, notwithstanding the existence of a grievance arbitration procedure, where the union and plaintiff take on

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[4] See *Demars v. Gen. Dynamics Corp.*, 779 F.2d 95, 97 (1st Cir. 1988) (hybrid cause of action accrues when union withdrew grievance filed against employer on plaintiff's behalf); *Stafford v. Ford Motor Co.*, 835 F.2d 1227, 1233 (8th Cir. 1987) (hybrid cause of action tolled while union pursued the grievance procedure against employer but began to run when union withdrew grievance after the third step); *Zuniga v. United Can Co.*, 812 F.2d 443, 449 (9th Cir. 1987) (cause of action accrued when the union advised the plaintiff that it would not pursue his grievance against employer any further); *Proudfoot v. Seafarer's Int'l Union*, 779 F.2d 1558, 1559 (11th Cir. 1986), *vacating in part*, 767 F.2d 1538 (11th Cir. 1985) (cause of action accrued when union exhausted its negotiations with the employer in an effort to get a discharged plaintiff reinstated); *Shapiro v. Cook United, Inc.*, 762 F.2d 49, 51 (6th Cir. 1985) (hybrid cause of action accrued when union chose not to submit grievance against employer to arbitration).

an "adversarial posture" prior to the exhaustion of the contractual remedies).

The foregoing case law demonstrates that, although the *results* of each case were different depending on the particular facts and equities present in each case, the lower courts have consistently applied uniform standards for determining when a hybrid fair representation/breach of contract cause of action accrues and/or is tolled. It is respectfully submitted that well-settled "guidelines" already exist which provide the lower courts with the direction and flexibility to make the requisite factual determinations and evaluate the particular equities in each individual case in order to determine if a cause of action is timely.[5]

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[5] Contrary to Petitioner's contention (Ptn. pp. 18-19) this Court's vacating the Eleventh Circuit decision of *Hester v. Int'l Union of Operating Eng'r*, 818 F.2d 1537 (11th Cir. 1987), *reh'g denied*, 830 F.2d 172 (11th Cir. 1987), *vacated* 109 S. Ct. 831 (1989), is irrelevant to the instant petition. *Hester* involved, *inter alia*, the issue of the appropriate statute of limitations to be applied to suits brought under Title I of the Labor Management Reporting and Disclosure Act ("LMRDA") and whether such limitations period is tolled where a plaintiff attempts to exhaust *internal union remedies*, not contractual grievance/arbitration procedures. *Cf. Clayton v. Int'l Union United Auto., Aerospace, Agric. Impliment Workers*, 451 U.S. 679 (1981); *Fransden v. Bhd. of Ry., Airline & Steamship Clerks*, 782 F.2d 674 (7th Cir. 1986). This Court vacated the judgment in *Hester* based on its interim ruling in *Reed v. United Transp. Union*, 108 S. Ct. 1105 (1989) that actions under Title I of the LMRDA are not controlled by a six month limitations period, as the Eleventh Circuit found in *Hester*, but by the most analogous state personal injury statute of limitations. The *Reed* decision did not in any way deal with the issues of accrual or tolling, and the Petitioner makes no contention that anything other than a six month statute of limitations is applicable to the instant matter. The district court below cited the *Hester* case solely as supporting authority for the proposition that the *DelCostello* six month statute of limitation accrues when the grievance procedure is "exhausted or otherwise broke down to the employee's disadvantage" (Ptn. p. 37(a)), a principle that was left undisturbed by this Court's ruling in *Reed*.

B. Petitioner Does Not Present An Appropriate Issue For This Court To Review Since it Simply Involves A Disagreement Over Factual Findings And The Manner In Which The Lower Courts Properly Applied Well-Settled Principles Of Law To These Findings.

i. *Petitioner asks this court to review evidence and facts which were resolved below in favor of Respondents.*

Petitioner asks this Court to review this case because he disagrees with the lower courts' factual findings and the manner in which the lower courts applied the well-settled accrual and/or tolling principles to these findings. Petitioner asserts that different accrual and tolling standards should have been applied to Petitioner's version of the facts herein — facts which Petitioner contends are inapposite to the facts present in other *DelCostello* limitation cases.

This Court has consistently refused to grant certiorari to review evidence and discuss specific facts. *Texas v. Mead*, 465 U.S. 1041 (1984); *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 177, n.8 (1981); *United States v. Johnston*, 268 U.S. 220, 227 (1925). The Petitioner seeks to have this Court review facts which in Petitioner's view would alter the outcome of this case. The asserted facts were rejected by the lower courts and have no support in the record. *See* (Ptn. pp. 9, 20); *but see* (Ptn. pp. 34(a), 38(a) n.2).

ii. *The lower courts properly applied the well-settled accrual and tolling principles to the facts of this case.*

Even if this Court were to deem this matter worthy of review, the district court properly concluded that Petitioner's claim against Respondents was time barred by the *DelCostello* six month limitations period. BRAC clearly communicated to

Petitioner as early as April 1986 its position that the provisions of the Union Shop Agreement were applicable to him and that he was required to pay the back dues that he owed. Thereafter, Petitioner retained counsel and sought to have BRAC's interpretation of the Union Shop Agreement set aside in arbitration. In January 1987, Petitioner and his counsel received copies of the arbitrator's decision, which concluded that Petitioner was in violation of the Union Shop Agreement. Petitioner, rather than complying with the award, resigned from employment effective February 16, 1987. (Ptn. pp. 37(a) - 38(a)).

Based on these facts the district court properly concluded that Petitioner knew or should have known of the cause of action against BRAC and Southern Pacific when the grievance procedure was exhausted; namely on January 24, 1987 when Petitioner and counsel received notice of the arbitrator's adverse decision. (Ptn. p. 38(a)). This decision comports with the authority previously discussed wherein the courts permit the contractual grievance arbitration procedure to toll the running of the limitations period until — *at the latest* — notice of the award is received. Moreover, although not specifically relied on by the courts below, the equities in favor of tolling the statute of limitations beyond the date Petitioner learned of the arbitration award simply are not present in this case, in light of the fact that Mr. Davies was represented by counsel during the entire time period the statute of limitations accrued and was tolled.

The decisions of the courts below were correct and in accordance with well-settled law applied to the facts of this case. Petitioner raises no cognizable grounds upon which to review the lower courts' decisions.

II. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S FINDING THAT PETITIONER MAY NOT RELITIGATE ISSUES IN FEDERAL COURT WHICH HAVE PREVIOUSLY BEEN DECIDED IN ARBITRATION.

As an alternative ground for granting summary judgment, the district court determined that Petitioner's claim was barred by arbitration. As the district court pointed out in its order, "the exclusive remedy for the type of claim [Petitioner] makes is the administrative procedure [Petitioner] has already pursued." (Ptn. p. 39(a)).

A. Federal Courts Have No Jurisdiction To Hear Issues De Novo Which Have Been Litigated At Arbitration Pursuant To Procedures Established Under The Railway Labor Act.

"A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding." *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 325 (1972), citing *Union Pac. R.R. Co. v. Price*, 360 U.S. 601 (1959). One of the five principal purposes of the Railway Labor Act ("RLA") is "to provide for the prompt and orderly settlement of all disputes growing out of the grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions." 45 U.S.C. § 151a(5). These disputes are known as "minor" disputes. *DeTomaso v. Pan Am. World Airways, Inc.*, 43 Cal.3d 517, 733 P.2d 614, 618 (1987), *cert. denied*, 108 S. Ct. 100 (1987). Chapter 8 of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, provides "an exclusive and comprehensive system for settlement of minor disputes through a process in the nature of compulsory arbitration using those with expertise in day to day operation of the railroad industry." *Barrett v. Mfrs. Ry. Co.*, 326 F. Supp. 639, 645 (E.D. Mo. 1971), *aff'd*, 453 F.2d 1305 (8th Cir. 1972). Under the RLA,

all disputes between a carrier and its employees are to be considered and decided by conference between designated representatives of the carrier and employees respectively. 45 U.S.C. § 152 Second. Minor disputes are to be adjusted and are to be settled "on the property" "in the usual manner," and failing adjustment, either party can take the matter to the National Adjustment Board or to a system, group or regional board of adjustment created to decide disputes of that character. 45 U.S.C. § 153 First (i); 45 U.S.C. § 153 Second; *Int'l Ass'n of Machinists, AFL-CIO v. Central Airlines, Inc.*, 372 U.S. 682 (1963). "Congress considered it essential to keep so-called minor disputes within the boards of adjustment and out of the courts because finality of administrative determinations is essential to the boards in fulfilling their task of promoting stability in the air and rail carrier industries." *DeTomaso v. Pan Am. World Airways, Inc.*, 733 P.2d at 619.

Petitioner has characterized his claim against Southern Pacific as one for "wrongful discharge" by means of an allegedly improper application or interpretation of the Union Shop Agreement between Southern Pacific and BRAC. The extent of Southern Pacific's duty to maintain Petitioner as an employee in this case depended on interpretation or application of the Union Shop Agreement, which is clearly a minor dispute subject to the RLA's requirement that it be submitted to grievance and arbitration. *See, e.g., Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972) (merits of petitioner's wrongful discharge claim depended on an interpretation of the collective bargaining agreement and was a minor dispute required by the RLA to be submitted to the Board of Adjustment).

Petitioner also asserts that he allegedly did not receive certain benefits to which he was entitled under the collective bargaining agreement; a claim also categorized as a minor dispute.

Because the RLA mandates that a minor dispute be resolved by resort to arbitration and grievance procedures, those procedures are the exclusive remedy available to the claimant. *Andrews*, 406 U.S. at 322; *DeTomaso*, 733 P.2d at 619; *see also Beers v. Southern Pac. Transp. Co.*, 703 F.2d 425, 429 (9th Cir. 1983) (where plaintiff's complaints referred to work conditions, disciplinary procedures, or rights covered by or substantially related to the collective bargaining agreement, the controversy was a minor dispute within the exclusive province of the grievance mechanisms of the Railway Labor Act). Recognizing his claim as a minor dispute, Petitioner submitted to the grievance and arbitration procedures required by the RLA. In this case, the arbitrator's decision resolved the dispute with finality and the district court, as it recognized and properly noted in its order, had no subject matter jurisdiction to resolve this minor dispute.

B. Federal Courts Have Jurisdiction To Review Arbitration Awards Under A Very Narrow Standard, And Such Review Has Never Been Requested By Petitioner.

The scope of judicial review of arbitration awards under the RLA is "among the narrowest known to the law." *Atchison, Topeka & Santa Fe Ry. v. Buell*, 107 S. Ct. 1410, 1414 (1987). Where a party has litigated a minor dispute before the Adjustment Board, he is limited to the judicial review of the Board's proceeding that the RLA itself provides. *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 325 (1972). The scope of review of an arbitrator's decision is established under the Railway Labor Act at 45 U.S.C. § 153 First (q) which provides:

> (q) . . . On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for

> failure of the division to comply with the requirements of this Chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order....

The three grounds of (1) failure of the arbitrator to comply with the requirements of the RLA, (2) failure of the award to conform, or confine itself to matters within the scope of the arbitrator's jurisdiction, or (3) fraud or corruption by an arbitrator have been determined, by this Court, to be the sole bases for setting aside an arbitration award. *Union Pac. R.R. Co. v. Sheehan*, 439 U.S. 89 (1978). The Railway Labor Act's "statutory language means just what it says." *Id.* at 93.

The arbitrator in this case heard and decided various issues, including the compliance by Petitioner with the Union Shop Agreement, the compliance by Southern Pacific and BRAC with the notification provisions of the Union Shop Agreement, and the enjoyment by Petitioner of the benefits of union membership equal to other employees in the union. The arbitrator heard and decided these issues against Petitioner. The arbitrator denied Petitioner's grievance and granted him the opportunity to remit in two payments the monies owed to put himself into full compliance with the Union Shop Agreement. The arbitrator also stated that failure to comply with such provisions of the award would result in termination of Mr. Davies' employment relationship. In this case, Petitioner has never asserted that the arbitration proceeding was tainted by any one of the three grounds which would allow the district court to review the arbitration award. To allow Petitioner to proceed would circumvent the statutory restrictions on judicial review of arbitration decisions. *Andrews*, 406 U.S. at 324; *Pitts v. Nat'l R.R. Passenger Corp.*, 603 F. Supp. 1509, 1515 (E.D. Ill. 1985). As this Court recently stressed in *United Paper Workers Int'l Union, AFL-*

CIO v. Misco, 108 S. Ct. 364 (1987), "[t]he courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." The district court properly determined that Petitioner could not relitigate his claim in an independent federal judicial proceeding.

C. Standards Of Review Established Under The Labor Management Relations Act For Arbitration Awards Are Irrelevant To This Petition.

Petitioner continues to rely on case law construing Section 301 of the Labor Management Relations Act ("LMRA"). The LMRA, by its own terms, does not apply to Railroad employers, employees or unions. 29 U.S.C. § 152(2) of the LMRA defines employer as "any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any person subject to the Railway Labor Act, as amended from time to time, or any labor organization. . . ." The Code defines the term employee as including "any employee . . . but shall not include any individual employed by an employer subject to the Railway Labor Act." 29 U.S.C. § 152(3). Southern Pacific is clearly a railroad, BRAC is a railroad union, and Mr. Davies was an employee of Southern Pacific; therefore, none of these three parties are governed by the LMRA. Additionally, federal courts do not have jurisdiction under Section 301 of the LMRA, 29 U.S.C. § 185, over suits brought by parties that are covered by the RLA. *Raus v. Bhd. Ry. Carmen of United States and Canada*, 663 F.2d 791 (8th Cir. 1981).

Petitioner erroneously cites *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) for the proposition that disputes arising out of labor contracts should not be limited only to the arbitral process. This Court in *Lueck* was deciding whether federal or state law should apply to claims arising under Section 301 of

the LMRA, 29 U.S.C. § 185(a). This Court was in no way addressing the preclusion of a suit being brought in district court for a minor dispute which had been settled by an arbitrator.

Petitioner additionally relies on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). *Alexander* has no application to the case before this Court. The petitioner in *Alexander* had a discrimination claim against its employer. Remedies for this type claim were provided for under the collective bargaining agreement. These remedies, however, were not exclusive because Title VII of the Civil Rights Act of 1964 provides a separate and distinct remedy for such behavior on the part of the employer which may be brought directly to federal court. An arbitrator's decision in that instance would have no effect on the district court's jurisdiction of the Title VII claim.

In stark contrast, the case before this Court arises solely under the Collective Bargaining Agreement and the Union Shop Agreement. Petitioner's claim clearly relates to the procedures to be followed under the Union Shop Agreement, by himself, Southern Pacific and BRAC. All of these questions are clearly characterized as minor disputes which, by the terms of the RLA, must be submitted to the grievance and arbitration procedures and governed by the finality of the arbitrator's decision. The court of appeals properly affirmed the district court's alternative holding that Petitioner's attempt to obtain a de novo trial of the issues litigated before the arbitrator is a substantive ground for the granting of summary judgment.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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